

have gone forward at that time with his loan proposal. Tr. 689-93.

54. Mr. Rey also testified about Mr. Conant's financing commitment in his oral testimony in this matter. Mr. Rey asserted that, at the time of his testimony in the Miami Tower Litigation, he believed that if RBC were to be relegated as a sixth station in the market that it would have been worthless at that time. Tr. 780. He explained his thinking at the time as follows (Tr. 781):

I believe that if [RBC] were relegated as the sixth station in the marketplace, there was not enough revenues to go around to make that station, the sixth station, that is, viable, and I don't think anybody in their right mind would have put money into something that could not pay for itself. (Emphasis added.)

55. In sum, Mr. Rey testified that at the time he gave his testimony in the Miami Tower litigation in January 1991, he believed that if Press were allowed to put its antenna at the top slot of the Bithlo Tower, RBC would not be able to secure financing. Tr. 780-82. Unless RBC prevailed in the Miami Tower Litigation, Mr. Rey considered the construction permit to be "worthless" and he "would have chosen maybe to give it back to the FCC or something like that at that time." Tr. 888.

56. Mr. Rey continued to hold those opinions through January and February 1991, and did not change his opinion until late May or early June of 1991 when he believed that the economic outlook had improved and when he heard that Neilsen meters were coming into the market. Tr. 781-82, 797-98.

57. The district court denied RBC's motion for a preliminary injunction in the Miami Tower Litigation on June 6, 1991. *Rey v. Gannett*, 766 F.Supp. 1142 (S.D. Fla. 1991) (order denying preliminary injunction) (official notice requested). See Tr. 740. In

denying RBC's motion, the district court held that RBC had failed to establish "irreparable harm." *Id.* at 1148. (Official notice requested.) The court found (*id.*):

[RBC's] claim of damages . . . appear speculative and remote. First, [RBC] has not arranged financing; a note for financing has not been completed. As there is no convincing proof that [RBC] actually has financial backing, the claim of irreparable harm appears speculative. Second, and more important, although an injunction may be granted where the prospective breach threatens the destruction of an "ongoing" business, . . . , Plaintiff's business cannot truly be characterized as ongoing. At this point, [RBC] only owns a construction permit and a lease. The evidence illustrated that since 1982, [RBC] has yet to obtain financing, has not selected or purchased an antenna, has not selected a wave guide, has not selected a transmitter, has not obtained building plans for a broadcast building and has not gone on the air. In short, Plaintiffs have not likely proven that their business is ongoing and in fear of destruction.

58. By the time that Judge Marus denied RBC's motion for preliminary injunction, Mr. Rey's opinion of the viability of RBC as the sixth station in the Orlando market had changed, so that he no longer believed that winning the preliminary injunction was essential for RBC's survival. Tr. 917.

59. However, even after the decision denying RBC's motion for a preliminary injunction, Mr. Rey still never went to Mr. Conant to say that RBC was ready for him to begin financing the construction. Tr. 703-04. Ultimately RBC decided to use equity financing for constructing the station by forming RBL to acquire the construction permit, and never asked Mr. Conant to make his promised loan to RBC for construction of the station. *Id.*

Issue 3: Tower Litigation Misrepresentation Issue

60. Issue 3 seeks "To determine whether [RBC] made misrepresentations of fact or was lacking in candor regarding the nature of the tower litigation in terms of its failure to

construct in connection with its fifth and sixth extension applications, in violation of Sections 1.17 and 73.11015 of the Commission's rules or otherwise."

61. The issue arose because RBC represented to the Commission in its fifth and sixth extension applications (Jt. Exs. 2 & 3) that "[a]ctual construction has been delayed by a dispute with the tower owner which is the subject of legal action in the United States District Court for the Southern District of Florida." Jt. Ex. 2, p. 3; Jt Ex. 3, p. 3. The Court of Appeals concluded that substantial and material questions of fact exist regarding RBC's representations about its failure to construct. *Press*, 59 F.3d at 1371. The Court held that "the issue is material because the tower dispute was [RBC's] sole basis for its petition." *Id.* The Court stated that "although [it] recognize[s] that questions of misrepresentation are ordinarily within the province of the Commission," citing *American Message Centers v. FCC*, 50 F.3d 35, 41 (D.C. Cir. 1995), "the FCC's conclusion that no material question of fact existed because '[RBC] did not . . . represent to the Commission that the tower dispute precluded it from constructing,' . . . is so flatly inconsistent with the clear import of [RBC's] representation as to require further proceedings." *Id.*

62. RBC filed its application for a construction permit for a new television station on Channel 65 in Orlando, Florida in 1982. Jt. Ex. 1, Stipulation No. 1; Tr. 712. The Commission granted RBC's application in 1984 following a comparative proceeding with two other applicants. *Metro Broadcasting, Inc.*, 99 FCC 2d 688 (Rev. Bd. 1984), *review denied*, FCC 85-558, released October 18, 1985. Jt. Ex. 1, Stipulation No. 2. The decision awarding the construction permit to RBC was appealed to the Court of Appeals in 1985 (Case Nos. 85-1755 & 85-1756) and RBC delayed the start of construction pending the

outcome of that litigation. Jt. Ex. 1, Stipulation No. 3; Jt. Ex. 2, pp. 2-3; Jt. Ex. 3, pp. 2-3.

63. RBC's original construction permit for Station WRBW(TV) was issued by the Commission on April 22, 1986. Jt. Ex. 1, Stipulation No.4. The original expiration date of that permit was April 22, 1988. However, RBC did not complete, or even commence, construction of its station by that deadline. Tr. 712; Jt. Ex. 2, pp. 2-3.

64. In 1986, prior to a decision by the Court of Appeals in Case Nos. 85-1755 & 85-1756, the Court of Appeals remanded the cases at the request of the Commission. Jt. Ex. 1, Stipulation No. 5. Between November 1986 and February 1988, RBC's construction permit was held in abeyance pending the outcome of the Commission's review of its minority ownership policies. *See Metro Broadcasting, Inc.*, 2 FCC Rcd 1474 (1987) and 3 FCC Rcd 866 (1988). Jt. Ex. 1, Stipulation No. 6. The construction permit expired in April 1988, during the pendency of the litigation, *Press*, 59 F.3d at 1367 (official notice requested), and the Television Branch of the Video Services Division of the Bureau cancelled it in June 1988. *Id.*; Tr. 713, 757, 806. The permit was cancelled because of RBC's failure either to construct or seek an extension. *Press*, 59 F.3d at 1367; Tr. 757. The Television Branch acknowledged that appeals of the grant of RBC's permit were still pending and stated that "the pendency of an appeal does not operate as an automatic stay" of the expiration of the permit, and that an application for extension or reinstatement of the permit would have to be filed. The Television Branch reinstated the permit after RBC explained the ongoing litigation, but did so on the condition that RBC file a formal application for extension of time. *Press*, 59 F.3d at 1367; Tr. 807. The Television Branch explained "[s]ince the

pendency of an appeal does not operate as an automatic stay, you should have filed an application . . . for additional time within which to construct." *Press*, 59 F.3d at 1367.

RBC subsequently applied for and received four extensions on July 11, 1988; May 10, 1989; November 17, 1989; and July 2, 1990. Jt. Ex. 1, Stipulation No. 8; Tr. 377, 712-14.

65. The consolidated cases (Nos. 85-1755 & 85-1756) were returned to the Court of Appeals in June 1988. Jt. Ex. 1, Stipulation No. 7. In April 1989, the Court of Appeals affirmed the Commission's decision to grant RBC's application and to award the construction permit to RBC. *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989). Jt. Ex. 1, Stipulation No. 9. The Supreme Court affirmed the construction permit grant to RBC on June 27, 1990 and denied rehearing on August 30, 1990. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), *petition for rehearing denied*, 497 U.S. 1050 (1990). The grant of the construction permit to RBC became "final," *i.e.*, no longer subject to administrative or judicial review, on August 30, 1990. Jt. Ex. 1, Stipulation No.11; Tr. 505. After August 30, 1990, there was no pending litigation concerning RBC's construction permit. Tr. 762. At that point, there was no valid reason for RBC not to construct. Tr. 763.

66. Nevertheless, despite having obtained four extensions of time on the ground that it did not want to build while the grant of its application was being challenged in the Court of Appeals and the Supreme Court, RBC did not begin construction of the station shortly after the Supreme Court denied rehearing. Instead, RBC started another round of litigation on or about November 2, 1990, by bringing an action for injunctive relief in Florida state court against Guy Gannett Publishing Company ("Gannett"), the owner of the

transmission tower ("the Bithlo tower") RBC planned to use. Jt. Ex. 1, Stipulation No. 12; Press Ex. 9; Tr. 777.

67. The lawsuit was originally filed in Florida state court, but Gannett removed it to the United States District Court for the Southern District of Florida within a week of its filing. *Joseph Rey, et al. v. Guy Gannett Publishing Co., et al.* (No. 90-2554-CIV, United States District Court, S.D. Florida) ("Miami Tower Litigation"). Jt. Ex. 1, p. 2; Tr. 731, 931. See Press Ex. 9; Tr. 777. The complaint alleged that RBC had the exclusive right to use the tower's top television broadcasting space, which Gannett had also rented to Press. Press Ex. 9, p. 3.

68. Mr. Rey testified that he personally signed and swore to the accuracy of the complaint. Tr. 774, 778; see Press Ex. 9, pp. 9-10. The complaint specifically incorporated by reference the statement of Susan Harrison, a principal in a Washington, D.C. consulting firm specializing in financial and economic analyses for the communications industry, who averred, *inter alia*, that if Gannett leased the space to Press RBC will be irreparably injured because, according to Harrison, RBC's construction permit will be worthless and RBC "will not be able to secure the financing to build a television station for Channel 65 on the Bithlo tower or any other tower in the area." Press Ex. 9, pp. 9 & 12-14. RBC, in an effort to prevent Press from moving to the Bithlo tower, sought a preliminary injunction in *Rey v. Gannett* barring Gannett, the tower owner, from leasing the tower space to Press. Press Ex. 9. It was that suit which was the "dispute" cited by RBC in its fifth extension application. Jt. Ex. 2, p. 3.

69. Mr. Rey claimed that he was told by Richard ("Rick") Edwards, an officer of

Gannett, in August 1990 that Gannett was going to enter into a lease with RBC's competitor, Press, for space on the Bithlo tower. Tr. 731. RBC "end[ed] up filing a lawsuit" against Gannett to prevent Press from going on the tower. *Id.* According to Mr. Rey, RBC objected to Press being on the Bithlo tower because Gannett "intended to duplicate the singular space that RBC had leased . . . in 1986, and lease it" to Press. Tr. 975.

70. The Miami Tower Litigation was not the only effort by RBC to resist Press's efforts to improve its service to the public in the Orlando market by moving to the Bithlo tower. RBC also objected at the Commission to Press's request for approval of a channel exchange between Press and a Cocoa, Florida educational television station which would result in Press's station operating from the Bithlo tower. *See Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Clermont and Cocoa, Florida)*, 4 FCC Rcd 8320 (Mass Media Bureau 1989), *aff'd*, 5 FCC Rcd 6566 (1990) (official notice requested). After RBC was unsuccessful in its efforts at the Commission to oppose the channel swap, it filed a petition for review of the Commission's orders in the Clermont/Cocoa proceeding in the Court of Appeals. The petition for review was filed on December 10, 1990, which was shortly after RBC filed its complaint in the Miami Tower Litigation. The petition for review was denied by the Court of Appeals on November 8, 1991 in *Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405 (D.C. Cir. 1991) (official notice requested).

71. By August 30, 1990, the grant of RBC's construction permit had become final, Jt. Ex. 1, Stipulation No. 11, and the only reason for RBC not going forward with construction -- *i.e.*, the pending appellate litigation in the Court of Appeals and then in the

Supreme Court -- had disappeared. On January 25, 1991, RBC, having filed its complaint in the Miami Tower Litigation and its petition for review in the Court of Appeals challenging the Commission's decision in the Clermont/Cocoa proceeding, filed its fifth application for an extension of time at the Commission. It. Ex. 2. RBC advised the Commission in this application that it had still not undertaken any construction. *Id.*, p. 1. RBC again recited the appellate history of the comparative case. *Id.*, pp. 2-3. At this time, all of the appeals in the comparative case had been finally concluded some five months earlier. RBC stated as follows (*id.* p.3):

Upon [conclusion of all appeals], [RBC] engaged engineering services to undertake construction of the station. ***Actual construction has been delayed by a dispute with the tower owner which is the subject of a legal action in the United States District Court for the Southern District of Florida*** (Case No. 90-2554 CIV MARCUS). . . . * * * [RBC] anticipates that its exclusive right to the use of the tower aperture will be recognized by the District Court. [RBC] is ready, willing and able to proceed with construction upon a ruling from the District Court and anticipates completion of construction within 24 months of a favorable Court action. (Emphasis added.)

72. When it identified the "legal action" in "Case No. 90-2554 CIV" in its filing with the Commission, RBC was careful not to disclose the title of the case or the names of the parties. The full case name is "Joseph Rey, Leticia Jaramillo, and Esperanza Rey-Mehr, as General Partners of Rainbow Broadcasting Company, a Florida Partnership, Plaintiffs, v. Guy Gannett Publishing Co., Individually Guy Gannett Publishing Co., doing business as Guy Gannett Tower Co., Guy Gannett Publishing Co., doing business as Bithlo Tower Company, Gannett Tower Company, Individually, MPE Tower, Inc., Individually, and Gannett Tower Company and MPE Tower, Inc. as General Partner and Co-Partners doing

business as Bithlo Tower Company, a Florida General Partnership, Defendants." Press Ex.

9. Disclosing the names of the litigants would have alerted the Commission to the true nature of the "dispute with the tower owner" and to the fact that the dispute had been initiated by RBC's principals and not by "the tower owner." *Id.*

73. The *sole* factor cited by RBC in its fifth extension application as the reason for its failure to advance its construction at all during the most recent extension period (*i.e.*, July 1990 - January 1991) was "a dispute with the tower owner" relative to RBC's "right to use of the tower aperture." *Id.* But the "dispute with the tower owner" was not interfering with RBC's ability to construct. The "dispute with the tower owner" -- like RBC's objections at the Commission to Press's proposal in the Clermont/Cocoa proceeding to improve its signal and the subsequent petition for review in the Court of Appeals -- was a lawsuit *initiated by RBC* intended to prevent Press, licensee of a competing television station, from relocating Press's antenna to the Bithlo tower. By its terms, the complaint in *Rey v. Gannett* (Press Ex. 9) did not allege *any facts* which prevented RBC from proceeding with its own construction. More important, in sworn deposition testimony given on December 18, 1990, in the tower litigation, RBC's principal, Mr. Rey, displayed his awareness that RBC could construct its own station without regard to the lawsuit:

Q: Is it your understanding as you sit there right now, if you want to put the antenna up top, that you could put it up at that height on the tower?

Rey: I could put it up at that height, but I have to share it, is what they are telling me.

Press Ex. 17, p. 2. See Tr. 848, 856. Mr. Rey testified that his deposition testimony was "accurate," Tr. 848, and "truthful," Tr. 856.

74. Mr. Rey's deposition testimony was given approximately one month before RBC represented to the Commission in its fifth extension application that construction had been "delayed" because of a "dispute" with the tower owner. Jt. Ex. 2, p. 3. Thus, while RBC asserted to the Commission in its fifth and sixth extension applications that the "dispute" with the tower owner had theretofore "delayed" construction, Jt. Ex. 2, p. 3; Jt. Ex. 3, p. 3, the evidence adduced at the hearing shows that the tower dispute did not "delay" or in any way affect *RBC's* ability to construct. See Press Exs. 9 & 16; RBC Ex. 5.

75. Mr. Rey testified that RBC could not build its station "without a valid construction permit." Tr. 988. Mr. Rey admitted, however, that RBC had a valid construction permit from August 30, 1990 until August 5, 1991. Tr. 980, 983, 988.⁵ Mr. Rey also testified that if the Commission had given RBC a "free and clear" construction permit in July 1991 the station would have been on the air by mid 1992. Tr. 870. But, according to Mr. Rey, RBC was "precluded" from constructing between November 27, 1990 and June 6, 1991 because of an order issued by Judge Marcus in the Miami Tower Litigation directing the defendants in the case to maintain the status quo. Tr. 981.⁶

76. Judge Marcus, at a prehearing conference in the Miami Tower Litigation on

⁵ Press did not come into the picture until February 15, 1991, when it filed its informal objections to the fifth extension application. Thus, according to Mr. Rey's own testimony, RBC had a valid, unopposed, "free and clear" construction permit from August 30, 1990 until February 15, 1991, a period of 5 1/2 months. Yet, RBC did virtually nothing during this period to advance the construction of its station. In this regard, it should be noted that RBC actually completed construction of its station in a 7 1/2 month period when it finally constructed in 1993, and was ready to go on the air in March 1994. Tr. 981-82.

⁶ The defendants in the case were: Guy Gannett Publishing Co., Gannett Tower Co., Bithlo Tower Co., and MPE Tower, Inc. Press Ex. 9, p. 1. Neither RBC nor any of its principals was a defendant. *Id.*

November 27, 1990, ordered the status quo in the Miami Tower Litigation to be preserved.⁷ Press Ex. 16; RBC Ex. 5. According to its terms, the order was intended to preserve the status quo in the litigation pending a hearing on RBC's motion for a preliminary injunction.⁸ The order was memorialized in a transcript (Press Ex. 16) and in a subsequent order (RBC Ex. 5). Mr. Rey testified that, in his opinion, Judge Marcus's order "precluded" everyone in the litigation, RBC included, from going forward with construction. Tr. 732, 803, 831, 833, 834-36. To Mr. Rey, who was present at the prehearing conference, the judge's ruling meant that the status quo should be preserved, and, according to the terms of the lease, RBC could not construct without the landlord (Gannett). Tr. 732, 804, 805, 839. Mr. Rey testified that he interpreted the judge's order to mean that the defendants in the case -- including Gannett and the other defendants named by RBC in its complaint (Press Ex. 9) -- had agreed to continue to preserve the status quo until January 11, 1991, and not to sign an agreement or lease with Press and/or Channel 18 -- Press's station is licensed to operate on Channel 18 -- until the preliminary injunction hearing and the outcome is determined. Tr. 733. Mr. Rey testified that the order encompassed RBC as well because RBC could not

⁷ This was the only status conference held in the Miami Tower Litigation. Tr. 835.

⁸ The order rescheduled the preliminary injunction hearing for January 11, 1991. It stated in pertinent part:

Defendants have agreed to continue to preserve the status quo until January 11, 1991[1] and the Court hereby orders *Defendants* to preserve said status quo and to not sign or consummate any agreement or lease with PRESS and/or CHANNEL 18 until the Preliminary Injunction hearing is held and the outcome is determined.

build on its own. According to Mr. Rey, RBC had to go through the landlord and the landlord wanted to do a single construction scenario. Tr. 804.

77. In addition to Mr. Rey believing that RBC could not build because of Judge Marcus's order to preserve the status quo, Tr. 733, Mr. Rey cited a few provisions of RBC's lease agreement with Gannett (RBC Ex. 6) to support his stated "belief" that RBC could not build. Tr. 733-34. However, none of the provisions cited by Mr. Rey could reasonably be interpreted to have prevented or "precluded" Gannett from going forward with construction of the tower space for RBC. RBC was, after all, not a defendant in the case, but one of the four plaintiffs. RBC Ex. 6; Press Ex. 9, p. 1. (The other plaintiffs were RBC principals, Mr. Rey, Leticia Jaramillo, and Esperanza Rey-Mehr (Press Ex 9, p. 1)) And, by their terms, the judge's "status quo order" (RBC Ex. 5) and the transcript of the prehearing conference (Press Ex. 16) applied only to the defendants. Neither the order nor the transcript orders the plaintiffs to preserve the status quo. *Id.*; Tr. 733, 839. Mr. Rey admitted that there is no language in the transcript (Press Ex. 16) which reflects a prohibition by Judge Marcus against RBC constructing. Tr. 840, 977. Nevertheless, Mr. Rey continued to maintain that Gannett could not build on the Bithlo tower because it was "prohibited from doing so by Judge Marcus." Tr. 735, 804. But even if there were such an injunction, Mr. Rey finally admitted that RBC could have removed it simply by voluntarily dismissing its lawsuit and going forward with construction, *see* Tr. 888, as it had promised the Commission it would, Jt. Ex. 2, p. 3.

78. Mr. Rey testified that Judge Marcus changed the status quo on June 6, 1991, when he denied RBC's motion for a preliminary injunction. Tr. 740; *Rey v. Gannett*, 766 F.

Supp. 1142 (official notice requested).

79. On June 18, 1993, the Bureau's Video Services Division denied RBC's sixth extension application. The Division cancelled RBC's construction permit, deleted its call sign, and dismissed as moot its assignment application and Press's petition for reconsideration of the fifth extension. According to the Division, RBC had "a valid permit for a total of 32 months since the grant became final" with the termination of the appellate process in August 1990. The Division concluded that RBC had failed to establish the showing required to obtain an extension under Section 73.3534. Specifically, the Division held that RBC had not shown that it had made substantial progress toward construction or that circumstances beyond its control prevented construction, either during the 32-month period since *Metro Broadcasting* was decided or, more importantly, during the six-month construction period authorized by the grant of the fifth extension. The Division found that the tower dispute -- which was cited by RBC in the fifth and sixth extension applications as the sole reason for not going forward with construction -- was not over whether RBC could proceed with construction, but rather whether RBC's asserted claim of exclusivity for certain leased space prevented its competitor, Press, from co-locating on the same tower. As such, the Division held, the decision by RBC not to proceed with construction reflected a "deliberate business judgment" on RBC's part, a circumstance within its control. *Jt. Ex. 8.*

80. RBC filed a petition for reconsideration of the Division's decision on July 2, 1993 (RBC Ex. 8), which Press opposed (official notice requested). RBC's petition for reconsideration was accompanied by a sworn statement signed by Mr. Rey. *Id.* at p. 13; Tr. 824. Even though the Video Services Division had expressly concluded that the Miami

Tower Litigation did not preclude RBC from going forward with construction (Jt. Ex. 8, p. 3), Mr. Rey admitted at the hearing that there is not a single reference in the petition for reconsideration to an order of Judge Marcus that purported to preclude **RBC** from proceeding with construction during the time period November 1990 - June 6, 1991. Tr. 826. Mr. Rey said he didn't know whether RBC ever advised the Commission at any point from November 1990 to June 6, 1991, of any such order by Judge Marcus in the Miami Tower Litigation. Tr. 826-27. Mr. Rey was not able to point to any pleading or document filed by RBC at any time during the proceeding which makes reference to an order of Judge Marcus preserving the status quo or preventing RBC from going forward with construction. Tr. 827-28.

81. According to Mr. Rey (Tr. 828):

[F]rom 1990 to the present there has been a lot of things filed. Nothing comes to mind, but I really don't know. The answer could very well be that there hasn't been, but there might be some out here that I can't recall. I don't know is the answer.

In this regard, Howard Conant, an RBC witness who had many discussions in 1990 and 1991 with Mr. Rey about RBC's construction efforts and the Miami Tower Litigation, testified in response to a question by counsel for RBL that Mr. Rey never told him that "the tower litigation legally prevented [RBC] from going forward" with construction. Tr. 701.

82. The bottom line is RBC *never* told the Commission about an order to preserve the status quo in the Miami Tower Litigation. Tr. 830. Mr. Rey also conceded that aside from the prehearing conference (Press Ex. 16) and the subsequent written order (RBC Ex. 5), there was no other action in the Miami Tower Litigation which allegedly precluded RBC from proceeding with construction. Tr. 830.

83. It was Mr. Rey's belief between late 1990 and mid-1991 that it would have

been "worthless" for Press to have been the fifth station and RBC the sixth station in the Orlando market. Tr. 872, 916. RBC claimed it did not build its station between August 1990 and June 1993 because it did not have a construction permit. Tr. 874. But Mr. Rey admitted that if RBC had dismissed its lawsuit against Gannett, RBC could have proceeded with construction. Tr. 888. Mr. Rey added: "Yes, that's true, and it could have been worthless . . . and I would have chosen maybe to give [the construction permit] back to the FCC or something like that at that time." *Id.*

84. The district court denied RBC's motion for a preliminary injunction in the Miami Tower Litigation on June 6, 1991. *Rey v. Gannett*, 766 F.Supp. 1142 (S.D. Fla. 1991) (order denying preliminary injunction) (official notice requested). *See* Tr. 740. In denying RBC's motion, the district court made the following findings: RBC held only a "non-exclusive" right to transmitter space, *id.* at 1144, 1146-47; RBC had not established that Press's transmitter would result in any significant interference to RBC's operation, *id.* at 1145; RBC had failed to establish "irreparable harm" because RBC "has not arranged financing," *id.* at 1148; and an injunction would be contrary to the public interest in competition among broadcasters, *id.* at 1148-49. (Official notice requested.)

85. A few weeks later, on June 25, 1991, RBC filed its sixth extension application. Jt. Ex. 3; Tr. 741. RBC promised to begin construction immediately and to commence operation "by December 31, 1992." Jt. Ex. 3, pp 1-3. The application was filed because the six month extension which had been granted in February 1991 was set to expire

in August.⁹ In this sixth extension application, RBC provided a verbatim restatement of the fifth extension application updated to reflect the district court's denial of RBC's motion for a preliminary injunction. The sixth extension application did not, however, identify by name the parties to the litigation or mention any of the district court's specific adverse findings or conclusions with respect to RBC (*e.g.*, that if Gannett leased the space on the top of the Bithlo tower to Press, RBC will not be able to secure financing). Furthermore, RBC did not seek to modify its earlier representation that it was "ready, willing and able" to construct. To the contrary, RBC unconditionally and unequivocally represented that it "will commence operation prior to December 31, 1992." Jt. Ex. 3, p. 3.

86. On November 8, 1991, the Court of Appeals issued its decision in *Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405, the channel swapping case. A few weeks later, on November 27, 1991, RBC filed a "Supplement" to its then-pending sixth extension application. Jt. Ex. 5. The supplement advised the Commission -- unequivocally and unconditionally -- that "[RBC] is proceeding with construction and anticipates completion and

⁹ See Section 73.3534(a) of the Commission's Rules ("Application for extension of construction permit or for construction permit to replace expired construction permit"), which provides that:

Application for extension of time within which to construct a station shall be filed on FCC Form 307, "Application for Extension of Broadcast Construction Permit or to Replace Expired Construction Permit." The application shall be filed at least 30 days prior to the expiration date of the construction permit if the facts supporting such application for extension are known to the applicant in time to permit such filing. In other cases, an application will be accepted upon a showing satisfactory to the FCC of sufficient reasons for filing within less than 30 days prior to the expiration date.

(Official notice requested.)

the commencement of operation in accordance with the schedule it previously set forth to the Commission," *i.e.*, RBC stated that it "anticipated that equipment contracts will be let in early 1992 and that the station will be operational by December 1992." Jt. Ex. 5, pp. 1 & 2. In a statement "made under penalty of perjury" attached to the supplement, Mr. Rey also stated that (*id.* at p.2):

In July 1991, [RBC] undertook the construction of a transmitter building at its transmitter/antenna location. That construction, at a cost of approximately \$60,000, was completed early [in November 1991]. With the completion of the building to house the transmitter, [RBC] is actively engaged in final equipment selection. The equipment bids are being accepted on the full RF plans.

87. Two days later, on November 29, 1991, RBC filed a *pro forma* assignment application, for the stated purpose of restructuring its organization to admit non-voting, limited equity partners, which would thereby -- in RBC's words -- "reduce its reliance on debt" and enable it to "complete construction and commence operation by December 1992" RBC did not advise the Commission in this application that consent to the proposed assignment was essential to construction, or that RBC's previous representations concerning its "read[iness], willing[ness] and ab[ility]" to construct might no longer be valid. Press Ex. 18.

88. In early 1993, RBC continued not to construct and the Bureau had not yet acted on Press's petition for reconsideration of RBC's fifth extension or on RBC's request for a sixth extension. In a letter to RBC, dated March 22, 1993, more than one and a half years after RBC's fifth extension had expired, the VSD noted that RBC had represented earlier to the Commission (*e.g.*, in its November 27, 1991 Supplement) that it "expected to construct the station by December 1992." Jt. Ex. 6. The VSD letter stated:

However, it does not appear that construction has been completed. At this time, we cannot conclude that grant of the [sixth] extension application would serve the public interest. We therefore request that you provide a detailed explanation of what specific actions you have taken towards construction *since* November 27, 1991 [the date of the Supplement to the sixth extension application]. Accordingly, further consideration of your application will be deferred for 20 days to allow you the opportunity to respond. (Emphasis added).

89. On April 12, 1993, RBC responded to the Division's letter by stating that it took *no further actions* after November 27, 1991. Jt. Ex. 7, pp. 1-3. RBC asserted that release of the funds needed to purchase equipment and construct the station was tied to the approval of its *pro forma* assignment application that was filed on November 29, 1991. *Id.*, p. 2. RBC claimed that it had completed construction of its transmitter building at a cost of \$60,000, that it had maintained its lease for tower space since 1986 at an approximate cost of \$500,000, and that it had selected equipment. However, RBC contended that its efforts to proceed with construction were frustrated by the Division's failure to act on its sixth extension application and its *pro forma* assignment application. Jt. Ex. 7. Again, Press filed oppositions, and RBC filed responsive pleadings. (Official notice requested).

90. RBC eventually settled the Miami Tower Litigation with Gannett after Mr. Rey changed his mind in mid-1991 about the value of RBC as the sixth television station in the Orlando market. Tr. 985-86. RBC agreed with Gannett that Press could share the top position on the Bithlo tower as part of its settlement with Gannett. Tr. 985. RBC actually completed construction of its station in a 7 1/2 month period when it finally constructed in 1993, and was ready to go on the air in March 1994. Tr. 981-82. RBC and Press are currently operating on the same 1500 foot slot on the Bithlo tower. RBC and Press share the aperture and there has been no interference. Tr. 975.

Issue 4 - Section 73.3534/73.3598 Issue

91. This issue seeks to determine "whether [RBC] has demonstrated that under the circumstances either grant of a waiver of Section 73.3598(a) or grant of an extension under Section 73.3534(b) is justified."

92. When it designated this proceeding for hearing, the Commission explained that the Court of Appeals had

directed the Commission to address whether [RBC] has made the requisite showing under 47 C.F.R. [§] 73.3534 to justify the grant of [RBC's] sixth extension application. Specifically, we had interpreted our rules as not requiring [RBC] to make the showing ordinarily required under Section 73.3534 for extensions beyond the normal 24-month construction period afforded permittees by Section 73.3598, because we believed that "it would have been unreasonable to have required or expected [RBC] to proceed with construction while faced with the uncertainties resulting from the appellate challenges to its construction permit." We thus concluded that the 24-month construction period should have run from the time when the appellate litigation concluded in August of 1990. The court, however, pointed out that the "plain language" of Section 73.3598 required that construction occur 24 months "from the date of issuance of the original construction permit." It thus concluded that the Commission must address whether [RBC] has made "the required showing of progress" under Section 73.3534 that would have justified the grant of the extension of time to construct.

Hearing Designation Order, 11 FCC Rcd at 1168 ¶ 7 (footnotes omitted). The Commission, therefore, designated an issue to determine whether there is any factual basis to support either a grant of a waiver of Section 73.3598 or a grant of an extension request based on Section 73.3534(b). *Id.*

93. RBC's original construction permit for Station WRBW(TV) was issued by the Commission on April 22, 1986 and expired on April 22, 1988. Although fully authorized to

construct and operate, RBC declined to do so until its grant had become final at the conclusion of all judicial appeals. To that end, RBC filed four applications for extension or reinstatement of its construction permit during the course of the appellate litigation concerning its permit. In those applications, the *sole* basis stated for not going forward with construction was the fact that RBC's grant was still subject to judicial review.

94. The grant of the construction permit to RBC became "final," *i.e.*, no longer subject to administrative or judicial review, on August 30, 1990. Jt. Ex. 1, Stipulation No. 11. Thus, the justification upon which RBC had relied up to that point for non-construction - *i.e.*, the ongoing appellate litigation -- was no longer available as a reason for not constructing.

95. On January 25, 1991, RBC filed its fifth extension application. Jt. Ex. 2. Since its "on-going appeals" justification had, as of August 30, 1990, been removed, RBC needed to offer another reason for non-construction. RBC stated (Jt. Ex. 2, p. 3):

Upon denial of rehearing by the Supreme Court [in *Metro Broadcasting*], [RBC] engaged engineering services to undertake construction of the station. *Actual construction has been delayed by a dispute with the tower owner which is the subject of legal action in the United States District Court for the Southern District of Florida* (Case No. 90-2554 CIV MARCUS). A Motion for Preliminary Injunction was heard on January 11, 14, and 16, 1991 and is scheduled to conclude on January 23, 1991, with a decision anticipated shortly thereafter.

[RBC] anticipates that its exclusive right to the use of the tower aperture will be recognized by the District Court. [RBC] is ready, willing and able to proceed with construction upon a ruling from the District Court and anticipates completion of construction within 24 months of a favorable Court action. (Emphasis added.)

Again, the *sole* basis alleged by RBC for its failure to construct was the "dispute with

[RBC's] tower owner." *Id.*

96. RBC's fifth extension application was granted on February 5, 1991, with the new expiration date set at August 5, 1991. On June 25, 1991, RBC filed a sixth extension application. In this application, RBC repeated its remarks about the length of the appellate process that had ended almost one year earlier and then stated (Jt. Ex. 3, p. 3):

Upon denial of rehearing by the Supreme Court [in *Metro Broadcasting*], [RBC] engaged engineering services to undertake construction of the station. *Actual construction has been delayed by a dispute with the tower owner which is the subject of legal action in the United States District Court for the Southern District of Florida* (Case No. 90-2554 CIV MARCUS). A Motion for Preliminary Injunction was denied by the court on June 6, 1991.

Immediately upon denial of the preliminary injunction request, [RBC] notified the tower owner of its intention to commence construction (a copy of the letter to Guy Gannett Tower Co. is appended hereto) and requested that he lease provisions regarding construction bids be effectuated. In addition, RBC has initiated discussions with equipment manufacturers regarding construction specifications and intends to place its equipment order as soon as the building construction schedule is finalized. (Emphasis added.)

In that same submission, RBC represented that it

will commence operation prior to December 31, 1992, as it previously informed the Commission.

97. Thus, in its fifth and sixth extension applications, RBC was seeking extensions *solely* on the basis of its claim that "a dispute" with its tower owner had somehow prevented construction. Further, RBC stated in its sixth extension application that it was at that time going forward with construction, that it would place equipment orders in the near future, *and* that it would begin operation "prior to December 31, 1992." Jt. Ex. 3, p. 3.

98. The "dispute" with the tower owner cited by RBC in its extension applications

was a lawsuit initiated by RBC. The lawsuit was designed to prevent RBC's tower owner from leasing tower space to RBC's competitor, Press. RBC did *not* allege in its lawsuit that the tower owner was preventing RBC from going forward with construction. Press Ex. 9. To the contrary, RBC's allegations in the civil suit demonstrate that there was no impediment to RBC's construction. *Id.* at pp. 1-10. In its complaint in *Rey v. Gannett*, RBC, over Mr. Rey's signature, stated that RBC "is now prepared . . . to commence construction However, [RBC's] permit for Channel 65 . . . is not a viable business opportunity if, in fact, [the tower owner] is permitted to place additional TV antennas" at the top of the tower. *Id.* at pp. 9-10. Furthermore, in sworn deposition testimony given in the tower litigation on December 18, 1990, Mr. Rey admitted that RBC *could construct* its facility at any time if it wanted to. Press Ex. 17, p. 2.

99. RBC adduced evidence at the hearing to demonstrate that it was proceeding in good faith with construction of the station between January 30, 1990 and July 23, 1991. See RBC Ex. 7. For example, on January 30, 1990, Mr. Rey wrote a letter to Rick Edwards (RBC Ex. 7, p. 1) in which Mr. Rey asked Edwards a number of questions seeking additional information regarding the transmitter room and the antenna on the Bithlo tower. *Id.* Tr. 727. Right after the Supreme Court denied rehearing on August 30, 1990, RBC was involved in preconstruction planning of the transmitter building for its station. RBC also selected equipment for the station. Tr. 726.

100. When Judge Marcus changed the status quo by denying RBC's motion for a preliminary injunction in the Miami Tower Litigation, RBC picked up where it had left off in the fall of 1990. Tr. 740. After RBC filed its sixth extension application on June 25, 1991,

it went ahead with construction of the transmitter building. Tr. 741. Aside from going ahead with construction of the transmitter building, however, RBC did nothing else with regard to construction. *Id.* Mr. Rey testified that RBC did nothing else because it did not have the money to do so. He said RBC could not buy a million dollar transmitter. "I don't have the money." Mr. Rey explained that the construction permit was not "free and clear" at time because it was being challenged" by Press. Tr. 741-42.

101. After the sixth extension application was granted by the Chief of the Mass Media Bureau in July 1993 (Jt. Ex. 9), RBC picked up where it had left off in 1991. RBC had built a transmitter building and had bought some equipment and installed it. Tr. 743. WRBW(TV) eventually went on the air in June 1994. Tr. 743.

102. Mr. Rey testified repeatedly that he always believed RBC had two years from August 30, 1990, in which to build its station. Tr. 744, 756, 807, 808, 811. Mr. Rey said his belief was based on a statement to him by a staff lawyer in the Bureau (Gordon Oppenheimer) that RBC would get its two years but in six month extensions. Tr. 756-57. Mr. Rey said he "always thought that we would get two years from final grant." Tr. 757. Using Mr. Rey's extremely generous measuring stick for construction (two years from "final grant"), rather than the "plain language" of the pertinent Commission rule (Section 73.3598(a)), which provides for "two years from the date of the original permit,"¹⁰ two years

¹⁰ See *Press*, 59 F.3d at 1371-72, where the Court of Appeals concluded:

The rule providing for a 24-month construction period manifests that the period runs from the date of the *original* permit, not of actual construction or of any subsequent extension:

Each original construction permit for the construction of a new TV broadcast

from a final grant for RBC would have been August 30, 1992. However, RBC's station did not go on the air until almost two years after that (June 1994). Tr. 743.

103. Mr. Rey conceded that after August 30, 1990, there was no pending litigation concerning RBC's construction permit. Tr. 762. Thus, as of August 31, 1990, there was no reason for RBC not to construct. Tr. 763. Approximately two months later, however, RBC filed its lawsuit against Gannett in the Miami Tower Litigation, *id*, and approximately three months later RBC filed its petition for review in the Court of Appeals in *Rainbow Broadcasting Co. v. FCC*, the channel swapping case (official notice requested). According to Mr. Rey, the purpose of the lawsuit in the Miami Tower Litigation was to preserve the rights RBC had leased in 1986. Tr. 763. RBC was trying to prevent Gannett from leasing certain space on the Bithlo tower to Press. Tr. 766. Mr. Rey claimed that RBC filed the lawsuit in October or November 1990 because Mr. Rey was told by Rick Edwards in August 1990 that Gannett was intending to sign a lease for a space on the tower with Press. *Id*. However, Mr. Rey admitted that he was aware as early as 1988 that Gannett intended to lease space on the tower to Press because Gannett asked Mr. Rey in 1988 for RBC's consent to lease space on the Bithlo tower to Press. RBC declined to consent. Tr. 766-67.

station, or to make changes in an existing station, shall specify a period of no more than 24 months *from the date of issuance of the original construction permit* within which construction shall be completed and application for license filed.

47 C.F.R. § 73.3598(a) (emphasis added). [RBC's] original construction permit was issued on April 22, 1986. Thus, [RBC] was unquestionably required to apply and qualify for an extension.

See also Hearing Designation Order, 11 FCC Rcd at 1168 ¶ 7.

104. Mr. Rey testified that equipment selection had been an ongoing process. RBC had been talking to transmitter manufacturers as early as the summer of 1990. There were bids on proposals in 1991, 1992 and 1993. As of April 10, 1993, however, RBC had no contracts to purchase an antenna. RBC also had not purchased a wave guide or transmitting equipment as of that date. Tr. 906. According to Mr. Rey, RBC's construction permit was not free and clear in April 1993. Tr. 908. Between November 27, 1991 and March 22, 1993, RBC did not undertake physical construction of the station. There was a lot of pre-construction, selecting equipment, getting prices. But no actual purchasing. Tr. 909.

105. RBC did not buy any equipment between November 1991 and March 1993. RBC solicited a lot of bids, studied a lot of equipment, selected equipment. RBC did not make any deposits on equipment until August or September 1993. Tr. 910. RBC talked to suppliers and got bids. Tr. 911. RBC paid approximately \$500,000 in rent for the Bithlo tower lease between October 1986 and August 1993. Tr. 947, 986-87; Jt. Ex. 7, p. 2.

106. In late 1990, Mr. Rey met with Howard Conant to discuss the Orlando situation. Tr. 789. Mr. Rey told Conant that RBC had filed the lawsuit in the Miami Tower Litigation concerning the tower lease. Tr. 752. Mr. Rey told Mr. Conant the lawsuit had been filed because RBC's competitor (Press) was attempting to move its transmitter site to RBC's site. *Id.* Mr. Rey was very concerned that "RBC's value could be nil." Tr. 753. Mr. Rey agreed with RBC's expert witness in the Miami Tower Litigation (Susan D. Harrison) that RBC's construction permit was "valueless" and "worthless" "if it were to be the sixth [television] station in the Orlando market at the time." *Id.* Press Ex. 9, pp. 9, 10, 12-14; Tr. 780, 790, 916, 939.